IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 89 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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GATUBHA MOHANSINH JADEJA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 89 of 1993

MR YOGESH S LAKHANI for Petitioner No. 1-4

Mr.A.J.Desai, learned A.P.P.for Respondent No. 1

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 05/08/2002

C.A.V. JUDGEMENT

1. The present appellants/original accused in the Sessions Case no. 174/91 have filed this appeal against the judgment and order passed in the said case against

the appellants by the Addl.Sessions Judge, Rajkot on 7.1.93 wherein the appellant no. 1 was convicted to simple imprisonment for one month and fine of Rs.100/- in default simple imprisonment for 7 days for the offence under Sec. 323 of the Indian Penal Code and all the appellants were convicted for simple imprisonment for one month and fine of Rs.100/- in default simple imprisonment for seven days for the offence under Sec. 504, 506(2), 114 of I.P.C. and further convicted the appellants for simple imprisonment for six months and fine of Rs.200/in default simple imprisonment for twelve days for the offence under Sec. 3(2)(10) of SC/ST Prevention of Atrocities Act. All the sentences were ordered to run concurrently. It appears that all the accused/appellants have paid the fine and therefore they were released on bail.

2. The short facts of the prosecution case are to the effect that on 9.7.90 at about 8.00 to 8.30 p.m. when the complainant Laljibhai Ambabhai was sitting in his house at village Vanpari, Taluka Padhadari at that time, the appellant no. 1 Gatubha Mohansinh came to his house and told him that as his house has fallen down, he should get it repaired by putting naliya. Thereupon, by using abusive language he further told to kill him. Due to such language used by the appellant no.1 the complainant was threatened and he hid in his house. At this time the appellant no. 2 to 4 came there and the appellant no. 3 Harisinh was having a stick in his hands. There was no light at that time and the appellant nos. 2 to 4 shouted to call Lala outside as they want to kill him. On account of the noise, Aluben Khimabhai and Khimabhai Sidibhai and other people came there. Aluben told the appellant no. 1 Gatubha Mohansinh not to speak abusive language. Hearing this, the appellant no. 1 gave two-three slaps on her face. At that time, Devshi the son of the complainant and Keshuben wife of the complainant and others came and due to absence of light, the complainant ran away and went to the house of one Bejuram Brahman at Padhadari from where both of them went to Padadri police station and gave complaint to P.S.I.Rathod at about 8.30 p.m. F.I.R. was lodged against the present appellants and further investigation was taken over by P.S.I.Rathod. P.S.I.Rathod went to the place of incident at Vanpari and recorded the statements of the witnesses. On 10.7.90, P.S.I.Rathod arrested the present appellants and panchanama of arrest was prepared. The appellant no. 3 Harisinh Jadeja produced the muddammal stick which was also seized under the panchanama. The panchanama of the scene of offence was also executed. Thereafter, the chargesheet was filed

against the present appellants before the Chief Judicial Magistrate, Rajkot. As the cases under Schedule Castes, Schedule Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Atrocities Act) are exclusively triable by the Court of Sessions, the matter was committed to the Sessions Court, Rajkot.

3. The learned Addl.Sessions Judge, Rajkot framed the charge against the accused at exh. 1 under Secs. 504, 506(2), 114 of I.P.C. and under Sec. 3(2)(10) of Atrocities Act. The charge was read over to the appellants/accused who pleaded not guilty and claimed to be tried. The prosecution therefore examined i) p.w.1 Complainant Laljibhai Ambabhai at exh. 10, ii) p.w. 2 Alubhai Khimabhai at exh. 12, iii) p.w. 3 Vibhaji Ranmalbhai at exh. 13, iv) p.w. 4 Ranvirbhai Valabhai at exh. 16, v) p.w.5 Dalpitsinh Himmatsinh Rathod at exh. 17. The prosecution also relied on documentary evidence such as FIR at exh. 11, panchanama at exh. 14 etc.

4. After recording of the evidence of the prosecution witnesses was over, the learned Judge questioned the accused generally on the case and recorded their statements under Sec. 313 of the Code of Criminal Procedure, 1973. In their statements the accused denied the case of the prosecution, however, none of the accused led any evidence in defence.

5. On appreciation of evidence led by the prosecution, the learned Judge convicted and sentenced the accused as stated above. In view of this, the present appellants/original accused have preferred this appeal against their conviction and sentence.

6. Learned Advocate for the appellants has taken me through the entire evidence on record. In the submissions, he has stated that the accused are of a Rajput community and the complainant is of S.C.Caste. On the day of the incident at about 8.00 to 8.30 p.m. the accused no. 1 came to his house and while speaking abusive language threatened to kill him and stated to repair his roof with the help of naliya. By this time, on account of the abusive language, other accused also came there wherein the accused no. 3 Harisinh was having a stick with him and all shouted the complainant to come out of the house. Aluben came and scolded the accused not to speak abusive language and in return the accused gave slaps on her face. Due to absence of light, the complainant ran away. By going through the deposition, the L.A. for the appellants submitted that what abusive

language was spoken by the accused/appellants is not brought on record. Mere saying that one of the accused spoke abusive language is not enough to bring the case under any section of the Atrocities Act. Moreover, what abusive language was spoken by the accused is not mentioned in the complaint nor he stated before the Court. According to the L.A. for the appellants, in absence of anything on record about the abusive language being spoken by the accused, the sentence and conviction awarded is bad in law and cannot be tenable at law. It is very easy now a days to say that the accused spoke abusive language and thereby the court cannot presume the words spoken against the person belonging to S.C. and S.T. caste.

7. While attacking the deposition of p.w. 2 Aluben Khimabhai, the learned advocate for the appellant submitted that after hearing the noise, she went there at the house of Lala Amba at which place she heard abusive language used by the present appellants. The accused no. 3 Harisinh was having a stick in his hand and the accused no. 1 gave slaps on her face when she tried to scold them. She has also heard the abusive language and threatening given to the complainant to kill him. The trial court has considered her as independent witness and relying on her deposition, the trial court has falsely convicted the present appellants. The trial court has erred in not considering that the witness Aluben is belonging to the same caste of the complainant and that she is related to him. The learned trial court has erred in coming to the conclusion that in such type of scuffle, only the next kin of the victim reach at the place who tries to save the injured person and no third person will try to intervene in such a problem. The learned advocate for the appellants-accused has stated that in this case there is only one eye witness Aluben whose deposition does not inspire confidence as she is related to the complainant. Therefore, there is a reason to believe that she has come only to support the complainant. There were many independent persons in the mob but none of them have been examined which creates doubt to the mind of the court regarding the independent investigation carried out by the Police Department. It was further submitted that the trial court came to the conclusion that no offence under Sec. 135 of Bombay Police Act has been committed by any of the accused then there is a reason to believe that none of the accused had any stick with them. Panchanama exh. 14 does not support the prosecution. Moreover, it is the say of the complainant Lalji that he after escaping the attack on him by the accused, went to the police station for filing complaint alone whereas it

is on record that first of all the complainant went to the place of one Bejuram Brahman and alongwith him went to the Padhadari police chowky to lodge the complaint. If that is the case then why that Bejuram Brahman is not examined ? Under the circumstances, there is a doubt created that the present appellants/accused had gone to the house of complainant Lalji and spoken some abusive language which will attract the provisions of Atrocities Act nor gave any slap to the witness Aluben. Thereby they have not committed any offence under Sec. 504, 506(2) of I.P.C. or under any provision of Atrocity Act. Accordingly the sentence and conviction of the accused requires to be set aside and fine paid by them be given back.

8. Learned A.P.P.Mr.Desai vehemently submitted that the accused was knowing that the complainant is hailing from SC & ST and in spite of that they spoke abusive language of his caste and thereby they have tried to show that the complainant belongs to the lower community. According to Mr.Desai, learned A.P.P. it is not necessary to repeat the words which were spoken by the accused to the complainant. So far as the injured witness Aluben is concerned, she is neighbour and wanted to stop the accused from quarrelling with the complainant and from speaking abusive language. In that process, the appellant no. 1 gave two slaps to her. She being an independent witness, runs the submission of Shri A.J.Desai, learned A.P.P. for the State, no other witness is required to be examined. In short, learned A.P.P. has fully supported the judgment and order passed by the learned trial court and submitted that no interference is required by this court and prayed for dismissal of the appeal.

9. I have gone through the judgment of the trial court and also the deposition on the record. So far as the Atrocity Act is concerned, I am of the opinion that actual words spoken or abusive language used by the accused must be brought on record. Mere deposition to the effect that abusive language was spoken by the accused is not sufficient to arrive at the conclusion that the accused-appellants have committed offence under Sec. 3(2)(10) of the Atrocity Act. If we peruse the complaint produced at exh. 11 it does not reveal the abusive language spoken by any of the accused-appellants. The complaint is dated 9.7.90 and the offence was registered at C.R.No. 75/90 at Padhadari police station against the present appellants/accused under Secs. 323, 504, 506(2), 114 of I.P.C. and Sec. 135 of Bombay Police Act. The police failed to book them under

Atrocity Act, however, by a subsequent correspondence dated 12.7.90, Sec. 3(15) of the Atrocity Act has been added. The said correspondent addressed to the Chief Judicial Magistrate, Rajkot is on page 63 of the paper book. In the light of the aforesaid discussion, if we peruse the deposition of the complainant Laljibhai Ambabhai at exh. 10, it also does not reveal the exact words spoken by any of the accused which would lower down the caste of the complainant in the society. The complainant was also threatened to be killed by the accused. One more aspect which also requires consideration is that the complainant should have produced cogent evidence on record showing that he belongs to SC & ST caste. In case of Bharatbhai Patel V/s State of Gujarat reported in 2001(2) G.L.H. 636 wherein this Court has observed that even though no contention is raised regarding the complainant belongs to SC & ST caste, to bring the case under the Atrocity Act, the complainant must produce such evidence on record. Assuming for the sake of argument that the accused has not taken any contention regarding the factum of complainant belonging to SC & ST caste, then also in my opinion the prosecution has miserably failed to prove on record the exact abusive language used by the accused-appellants.

10. In the case of Bharatbhai Patel (supra), it is mentioned on page 642 as under :

" Learned Counsel for the accused has submitted that by the consideration of the basic principle of jurisprudence and decision rendered by the Hon'ble Apex Court on appreciation of evidence, the benefit of doubt apparently should be given in favour of the accused which has been denied in this case and, therefore, this Court should exercise its revisional jurisdiction under Section 397 read with Section 401 of the Code. For that purpose, learned Counsel for the accused has relied upon an unreported judgment of this Court in a case of Criminal Revision Application No. 328 of 1982 decided by this Court (Coram : M.S.Parikh, J) on 11/12-1-94. For similar purpose he has also relied upon judgment of this Court in a case of Criminal Revision Application No. 328 of 1982 decided by this Court (Coram :M.S.Parikh, J)on 11/12-1-94. For similar purpose he has also relied upon judgment of this Court in a case of Criminal Revision Application No. 313 of 1990 decided by this Court (Coram : D.H.Waghela, J) on 4th August, 2000. In that

case after referring to Section 397 read with Section 401 of the code, this Court on page 12 of the said judgment has held as under :

"Under Section 401 of the Cr.P.C., this Court is clothed with the powers conferred on a Court of appeal by Sections 386,389,390 and 391 which include the power in reverse the findings and sentence and acquit or discharge the accused. A conjoint reading of the legal provisions as above and the facts and circumstances of this case clearly suggest that this is a fit case where the extraordinary powers of an Appellate Court are exercised."

11. The prosecution witness no. 2 Aluben also does not say the actual abusive language spoken by the accused-appellants in her deposition. In her deposition, she said that at about 8.00 to 8.30 p.m. they were preparing food at her house and when she heard shouts outside her house, she went to the house of Lala Ambabhai. While going to the place of the incident, she asked the accused-appellants not to speak abusive language. The appellant no. 3 was having a stick in his hand and the accused no. 1 gave 2 slaps to her. The accused were also speaking that they want to kill Lala and others. This witness Aluben admits that at the time of the scuffle, wife and children of Lalabhai were there in the house. Nobody was injured in the scuffle, however she was given two slaps. All the accused were speaking regarding killing Lalabhai who was hiding inside the house. She has not heard anything except kill him, kill him. There are 40 houses in his chawl and all the people were there at the time of the scuffle.

12. The panch witness Vibhaji at exh. 13 has not supported the prosecution case and had denied that in his presence the accused no. 3 produced any muddammal stick. Another panch witness Ranvirbhai at exh. 16 has turned hostile and denied that in his presence, the accused was arrested and one of the accused by name Harisinh produced the muddammal stick.

13. From the aforesaid deposition, it is very much risky to come to a conclusion that any of the appellants-accused have committed any offence under Sec. 3(2)(10) of the Atrocity Act and therefore the conviction and sentence of six months simple imprisonment and Rs.200/- fine in default 12 days simple imprisonment imposed on each of the accused deserves to be quashed and

set aside and accordingly it is set aside.

14. So far as the conviction and sentence of one month simple imprisonment and fine of Rs.100/- in default 7 days simple imprisonment on appellant no. 1, it may be noted that the incident took place on 9.7.90. 12 years have already been passed and instead of confirming the sentence imposed on accused no. 1, if witness Aluben is compensated in terms of money, the purpose will be served. The maximum fine under Sec. 323 of I.P.C. is Rs.1,000/- and it is required to be imposed on appellant no. 1. Therefore, the sentence imposed on appellant no. 1 of one month simple imprisonment and fine of Rs.100/in default 7 days simple imprisonment is altered and fine of Rs.1,000/- is imposed of appellant no. 1 in default simple imprisonment for one month.

15. The trial court has also convicted and sentenced all the accused under Sec. 506(2) to undergo simple imprisonment for one month and fine of Rs.100/- in default seven days simple imprisonment. As discussed earlier, no fruitful purpose will be served if at the end of 12 years the appeal is dismissed and they are sent to jail. Instead of that if the amount of fine is imposed and it is paid to the complainant and injured witness, the purpose will be served.

16. So far as Sec. 504 of I.P.C. is concerned, I am of the opinion that it relates to intentional insult with intent to provoke breach of the peace. Sec. 504 of I.P.C. reads as under :

> " Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two year, or with fine, or with both. "

While going through the aforesaid section, I fail to understand how the trial court came to the conclusion that by such incident there was intention of breach of peace. I have gone through the judgment of the trial court and I could not find anything specific on the aforesaid section. In view of the aforesaid circumstances, I am of the opinion that the trial court has failed in awarding the sentence and conviction on each of the accused under Sec. 504 of I.P.C. There is no separate sentence passed under Sec. 504 of I.P.C.

and there is common sentence of one month simple imprisonment and fine of Rs.100/- in default seven days simple imprisonment on each of the accused-appellants under Sec. 504 and 506(2) of I.P.C. I am of the opinion that such sentence should be altered and fine of Rs.750/on each on the accused-appellants should be imposed in default simple imprisonment for one month.

17. As a result of the aforesaid discussion, the following order is passed :

The appeal is partly allowed.

The conviction and sentence under Sec. 3 (2)(10) is quashed and set aside.

The conviction and sentence under Sec.323 of I.P.C. of one month's simple imprisonment and fine of Rs.100/- in default seven days simple imprisonment on appellant no. 1 is altered to fine of Rs.1000/- in default one month's simple imprisonment. This amount of Rs.1,000/- is directed to be paid to p.w. 2 Aluben.

The conviction and sentence under Sec. 504 and 506(2) of I.P.C. of one month's simple imprisonment and fine of Rs.100/- in default seven days simple imprisonment is altered to fine of Rs.750/- in default one month's simple imprisonment on each of the appellants. Out of the amount of Rs.750/- deposited by each of the appellants, Rs.500/- each making in all Rs.2,000/- is directed to be paid to the complainant. The remaining amount of Rs.1,000/- (Rs.250 * 4) shall be deposited in the Government Treasury.

The appellants shall deposit the amount of fine within one month before the lower court. On such deposit the trial court shall inform the complainant to withdraw the amount.

The amount of fine, if any, paid by the appellants shall be adjusted from this amount.

The bail bonds shall stand cancelled, if amount of fine is paid.

(SHARAD D DAVE, J)

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